Filed 7/10/19 P. v. Tolefree CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. LONGINO LAMORT TOLEFREE, Defendant and Appellant.	C084687 (Super. Ct. No. STKCRFE2014004618) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the nonpublished opinion filed herein on June 14, 2019, be modified as follows:

1. At page 22 of the slip opinion, at the end of the first full paragraph, strike the last sentence, which reads "This is another issue the People failed to address," and replace it with "The People did not address whether the convictions arose out of the same course of conduct."

There is no change in the judgment.

BY THE COURT:

/S/

RAYE, P. J.

/S/

BLEASE, J.

/S/

RENNER, J.

Filed 6/14/19 P. v. Tolefree CA3 (unmodified opinion)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. LONGINO LAMORT TOLEFREE, Defendant and Appellant.	C084687 (Super. Ct. No. STKCRFE2014004618)

At about 1:14 p.m. on January 11, 2014, defendant Longino Lamort Tolefree brought a twenty-month-old girl to the hospital. He said she was not breathing. The hospital staff was unable to detect a pulse or heartbeat and, at 1:39 p.m., they ended their attempts to resuscitate the victim and pronounced her dead. Before coming to the hospital, defendant had been at home with the victim and three other children since around 10:45 a.m. or 11 a.m., when the victim's mother left to go to the laundromat.

A jury found defendant guilty of one count of assault on a child causing death (count 1—Pen. Code, § 273ab, subd. (a))[1] and three counts of inflicting corporal punishment or injury on a child (counts 2 through 4—§ 273d, subd. (a)). The jury also found true with respect to counts 3 and 4 that defendant personally inflicted great bodily injury on a child under five years old. (§ 12022.7, subd. (d).)

The trial court sentenced defendant to 25 years to life in prison based on count 1, and stayed the sentences for counts 2, 3, and 4 pursuant to section 654. The court imposed fines and assessments, including a $5,000 restitution fine under section 294, subdivision (a), a $160 court operations assessment under section 1465.8, and a $120 court facilities assessment under Government Code section 70373.

On appeal, defendant argues: (1) his conviction must be reversed based on various instructional and prosecutorial errors; (2) counts 2 through 4 must be reversed because they are lesser than, and necessarily included within, count 1; (3) the evidence was insufficient to support count 2 as a separate violation of section 273d; and (4) in orally pronouncing sentence, the trial court erroneously stated defendant would be unable to earn post sentence worktime credits against his life sentence. The People concede this latter point, and we accept their concession and remand for the trial court to orally pronounce sentence without requiring defendant to serve 100 percent of his minimum term. We also conclude section 273d, subdivision (a) is a lesser included offense of section 273ab, subdivision (a), and defendant's convictions for counts 2, 3, and 4 must be reversed.[2] As a result, the court operations assessment (§ 1465.8) must be reduced to $40, the court facilities assessment (Gov. Code, § 70373) must be reduced to $30, and the

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[1] Undesignated statutory references are to the Penal Code.

[2] We therefore need not reach defendant's claims that the evidence was insufficient to support count 2 as a separate violation of section 273d and that the trial court improperly instructed the jury regarding this issue.

restitution fine imposed under section 294, subdivision (a) must be stricken. In all other respects, the judgment is affirmed.

I. DISCUSSION

A. Oral Instruction on Reasonable Doubt

1. Oral Instructions

The court orally instructed the jury on reasonable doubt based on CALCRIM No. 220. The instructions began: "The fact that a criminal charge has been filed against the Defendant is not evidence that the charge is true. You must not be bias[ed] against the Defendant just because he has been arrested, charged with a crime, or brought to trial. A Defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a Defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

The trial court then made the following comments: "There are some cases that have actually different burdens of proof throughout the case. How would that be? The burden of proof for guilt is always beyond a reasonable doubt, but there are evidentiary issues. We didn't have 'em in our case, but I've got a sex case coming up where a guy had prior sexual misconduct. It might be relevant in the case, and it's proved by a different standard, so the jury has to get, 'Oh, even if I believe he committed a prior offense in Indiana four years ago using the same motive, the same mo[d]us operandi, the same action, the same plan—okay, well, that wouldn't prove this.' No. You have to find the case in chief beyond a reasonable doubt, but there's little evidentiary burden. Our case doesn't have that."

After this digression, the court continued reading from CALCRIM No. 220, with two additions as indicated: "Proof beyond a reasonable doubt, *what is that?* Is proof that leaves you with an abiding conviction—*that means a lasting conviction*—that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. In deciding whether the People have proved

their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the Defendant guilty beyond a reasonable doubt, he is entitled to an acquittal, and you must find him not guilty." (Italics added.)

The jury also received written copies of CALCRIM No. 220. Defendant challenges the court's departure from the form language and these written instructions.

2. The Trial Court's Comments Regarding Differing Standards of Proof

Defendant contends the court's digression regarding differing standards of proof was confusing and had the effect of diluting the People's burden of proof.

"The federal Constitution's due process guarantee 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' [Citation.] The Constitution 'does not require that any particular form of words be used in advising the jury of the government's burden of proof,' but it does require that, ' "taken as a whole, the instructions . . . correctly conve[y] the concept of reasonable doubt to the jury." ' [Citation.] What matters, for federal constitutional purposes, is 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on' insufficient proof." (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 839-840 (*Daveggio*).) "An instruction that effectively lowers the prosecution's burden of proving guilt beyond a reasonable doubt is structural error because it 'vitiates *all* the jury's findings' and its effect on the verdict is 'necessarily unquantifiable and indeterminate.' " (*People v. Aranda* (2012) 55 Cal.4th 342, 365, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281, 282.)

Additionally, "[i]t is error for a court to give an 'abstract' instruction, i.e., 'one which is correct in law but irrelevant[.]' " (*People v. Rowland* (1992) 4 Cal.4th 238, 282.) " '[I]n most cases the giving of an abstract instruction is only a technical error

which does not constitute ground for reversal.' " (*Ibid*.) Reversal is not required unless there is a reasonable possibility the error affected the outcome. (*Ibid*.)

Here, the trial court did not actually instruct the jury on differing standards of proof. It did not provide the jury with a description of any different (or lesser) standard to erroneously apply to this case. To the extent the court's aside was error, any error was harmless because the trial court made clear that its digression was inapplicable to the present case. This was reaffirmed by the fact the jury received a written copy of CALCRIM No. 220 that did not include the aside the court expressly said was irrelevant. "[W]hen the jury has received an instruction in both spoken and written forms, and the two versions vary, we assume the jury was guided by the written version." (*People v. Jurado* (2006) 38 Cal.4th 72, 123.) Defendant argues this rule does not apply here because the court was not reading from CALCRIM No. 220 at the time it made the challenged comments and "[t]his was a supplemental oral instruction that was not given to jurors in written form." Again, we disagree that the trial court's comments regarding differing standards of proof were a supplemental oral instruction. In these circumstances, we conclude it is proper to assume the jury was guided by the written version. We conclude any error in the court's digression from its reading of the written instructions was harmless.

3. "Lasting Conviction"

Defendant contends the court erred in defining an "abiding conviction" as a "lasting conviction." His attempts to create distance between these phrases are unavailing. Defendant's argument relies heavily on a passage from an opinion of our Supreme Court disapproving a jury instruction that required only " 'that degree of proof which produces conviction' " rather than " 'abiding conviction.' " (*People v. Brigham* (1979) 25 Cal.3d 283, 290, 292 (*Brigham*).) In it, the court explained, "[t]he *lasting,* permanent nature of the conviction connoted by 'abiding' is missing and the juror is not informed as to how strongly and how deeply his conviction must be held." (*Id.* at pp.

290-291, italics added.) *Brigham* recognized that the word "abiding" in "abiding conviction," means the conviction is of a "lasting, permanent nature." (*Id.* at p. 290.) Defendant's assertion that "lasting" somehow fails to convey the same "lasting, permanent nature" of the conviction is erroneous. *Brigham* illustrates that an "abiding conviction" is essentially a "lasting" one. "Abiding" means "[l]asting for a long time; enduring."[3] (American Heritage Dict. (5th ed. 2016) p. 3, col. 2; see also Merriam-Webster Collegiate Dict. (11th ed. 2006) p. 2, col. 2 ["enduring, continuing"].) "Lasting" similarly means "[c]ontinuing or remaining for a long time; enduring." (American Heritage Dict. (5th ed. 2016) p. 992, col. 2; see also Merriam-Webster Collegiate Dict. (11th ed. 2006) p. 702, col. 1 ["enduring for so long as to seem fixed or established"].) The terms are synonymous.

Nonetheless, defendant argues "lasting" is inadequate because it does not convey what he terms "the intensity component" embodied in "abiding" and recognized in *Brigham*. This argument ignores both the similarity of the words "lasting" and "abiding," and the work that "conviction" is doing in the phrase "abiding conviction." A "conviction" is "[a] fixed or strong belief." (American Heritage Dict. (5th ed. 2016) p. 402, col. 1; see also Merriam-Webster Collegiate Dict. (11th ed. 2006) p. 274, col. 1 ["a strong persuasion or belief"].) While reference to "conviction" alone "may allow a juror to conclude that he or she could return a guilty verdict based on a strong and convincing belief which is something short of having been 'reasonably persuaded to a near certainty,' " reference to an "abiding conviction" or a "lasting conviction" does not. (See *Brigham, supra,* 25 Cal.3d at p. 291.) By modifying the word "conviction," both

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[3] Defendant does not actually provide a dictionary definition for either "abiding" or "lasting." Instead, he relies on what he terms,"[t]he most apt dictionary definition of the verb 'to abide.' " The verb "abide" and the adjective "abiding" are different words. Regardless, nowhere does he acknowledge the actual meaning of "lasting."

"abiding" and "lasting" help convey to a juror "how strongly and how deeply his conviction must be held." (See *id*. at pp. 290-291.) The court's explanation that an "abiding conviction" is a "lasting conviction" was not error.

B. CALCRIM No. 200

Defendant argues the trial court committed structural error in failing to give CALCRIM No. 200 in either written or oral form. As relevant to defendant's argument, CALCRIM No. 200 informs jurors that it is up to them to decide what the facts are and that they must follow the law as explained by the court.[4] Section 1127 provides: "The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." The People argue any failure to instruct on this point in CALCRIM No. 200 was harmless because other instructions conveyed the same information. We agree. Specifically, the jury was

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[4] CALCRIM No. 200 provides: "Members of the jury, I will now instruct you on the law that applies to this case. . . . [¶] You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant[s] or alleged victim[s], based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, [or] socioeconomic status. . . . [¶] You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions. [¶] Pay careful attention to all of these instructions and consider them together. If I repeat any instruction or idea, do not conclude that it is more important than any other instruction or idea just because I repeated it. [¶] Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings. [¶] Some of these instructions may not apply, depending on your findings about the facts of the case. . . . After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

told: it "must decide what the facts are in this case"; it "must use only the evidence that was presented in this courtroom"; it "must impartially compare and consider all the evidence that was received throughout the entire trial"; it "must decide whether a fact in issue has been proved based on all the evidence"; it "alone must judge the credibility or believability of the witnesses"; it "must decide what evidence, if any, to believe" if there was a conflict in the evidence; and its "role is to be an impartial judge of the facts." Accordingly, the trial court's failure to instruct with CALCRIM No. 200 did not violate its duty to inform the jury that it is the exclusive judge of the questions of fact.

Defendant's contention that the trial court's failure to give CALCRIM No. 200 violated a duty to inform the jury that they must follow the law is equally unavailing. Defendant argues requiring the court to "inform the jury in all cases that the jurors are the exclusive judges of all questions of fact *submitted* to them and of the credibility of the witnesses" implies a sua sponte duty to instruct the jury that the judge is the exclusive law giver and the instructions it receives must be obeyed. (§ 1127, italics added.) We are not persuaded. Defendant's citation to section 1122 is equally unhelpful. That statute provides, in relevant part, that "[a]fter the jury has been sworn and before the people's opening address, the court shall instruct the jury generally concerning its basic functions, duties, and conduct." (§ 1122, subd. (a).) By its terms, section 1122 is not applicable to the trial court's failure to give CALCRIM No. 200 because it is a post-trial instruction. And defendant concedes there is no authority for the proposition that a trial court's "duty to instruct sua sponte 'on those general principles of law that are closely and openly connected *with the facts* before the court and necessary for the jury's understanding of the case' " (*People v. Simon* (2016) 1 Cal.5th 98, 143, italics added) can be stretched to include a duty to instruct the jury on the principle that it is required to follow the law. To the extent it was adequately raised as a separate issue in his opening brief, we also reject defendant's assertion that the trial court's oral instructions to the jury created the impression that the instructions were directory rather than mandatory. Accordingly,

defendant has not established error—structural or otherwise—regarding the trial court's failure to give CALCRIM No. 200.

C. Prosecutorial Error

Forensic pathologist Dr. Bennet Omalu performed an autopsy on the victim's body. His testimony opining that the victim died within 15 minutes of sustaining blunt force trauma inflicted by an adult was a key part of the prosecution's case. The defense offered testimony from forensic pathologist Dr. David Posey. Dr. Posey gave his opinion regarding the victim's cause of death based on his review of the victim's medical records, police reports, and evidence related to the autopsy performed by Dr. Omalu. Defendant asserts the prosecutor committed prosecutorial error during closing argument by misstating Dr. Posey's testimony in three ways: (1) claiming Dr. Posey was forced to change his time estimate when confronted with histology on cross examination; (2) asserting Dr. Posey was forced to change his time estimate again when confronted with evidence that the victim lacked rigor mortis; and (3) asserting Dr. Posey was forced to concede the victim was injured 30 minutes before arriving at the hospital. Assuming defendant's trial counsel preserved these claims for review, only the claim that Dr. Posey was forced to change his time estimate when confronted with evidence that the victim lacked rigor mortis was a misstatement of the evidence. Nonetheless, the prosecutor's error was harmless.

1. Closing Argument

During closing argument, the prosecutor said the following:

"Now, Dr. Posey, his first expert opinion, based upon his report, was that a baby with these injuries—with those injuries would be within four to eight hours. And that's what he had in his report. That's what he testified to. Four to eight hours. And he really didn't give a reason. Go back through his testimony, please. Ask yourselves why did he come up with four to eight hours? Where did that number come from?

"Because then his next opinion, after I began questioning him, changed. And he said that his opinion was between zero to eight hours. Because when I began asking him about the APP test [(amyloid precursor protein analysis)], about the enzymes, about there being no white blood cells—and I was showing him that book where it said white blood cells would show up within 30 minutes to four hours and there were none present, that there's even 'more' white blood cells between four and eight hours, but they start immediately, and none of them were present. So then he expanded his opinion. He changed it when he was confronted with the medical evidence that he reviewed and believed it was well documented.

"Then he changed his opinion again. He had to agree, because I asked him about rigor mortis, which he said does not set in for—until about three hours after a person has been dead—about three hours after. Not zero to three. It begins at three hours.

"So if he presented—we saw the video footage of her at the hospital. Her arms—[the victim]'s arms are hanging there flapping, her legs and her arms. That was at 1:11 at the hospital. Go back three hours. That's 10:11, the time that the Defendant's hanging up the telephone with his mother in a house with people up and the boys. [The boys] told you, 'We didn't hear any beating, discipline, crying, anything.' They didn't hear anything. They were awake at that time, because they came down and one of them saw [the victim's mother] leaving out the door.

"Finally, Dr. Posey admitted, based upon my hypothetical, 'If a person presents a child at the hospital and says, "She was normal 30 minutes to me bringing her here," when, Dr. Posey, would you expect those injuries to have occurred?' And he said, 'Within that 30 minutes.' Because if a child is . . .

"[DEFENSE COUNSEL:] Objection. Misstates the evidence.

"THE COURT: Well, like I said, you guys heard both doctors testify at length. They're contentious issues between the parties. Now, what the Doctor's testimony was, you sort it out. If you disagree on something and you want it read back because you're

not sure, [the court reporter] will read it, okay. [¶] So we'll let you go ahead with that agreement, okay.

"[THE PROSECUTOR:] And read his testimony, because it was the last hypothetical. He said that those injuries would have had to occur within that 30 minutes if someone said that child was acting normal, which the Defendant told medical personnel, 'She was normal 30 minutes to me bringing her here.' Which means the Defendant was the only person who inflicted these injuries between that time period that he was alone, 11:00 to 1:15 to 1:00 p.m."

2. Applicable Legal Standards

Prosecutorial "error occurs, as a matter of state law, when a prosecutor 'engage[s] in deceptive or reprehensible tactics in order to persuade the trier of fact to convict.' [Citation.] Federal constitutional error occurs only when the prosecutor's actions 'comprise a pattern of conduct that is serious and egregious, such that the trial is rendered so unfair that the resulting conviction violates the defendant's right to due process of law.' [Citation.] 'In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict.' [Citation.] Under federal law, relief is not available if 'the challenged conduct was . . . harmless beyond a reasonable doubt.' " (*Daveggio, supra,* 4 Cal.5th at p. 854.)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) Nonetheless, "mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823.)

3. Four- to Eight-Hour Window

Defendant's contention that the prosecutor improperly claimed Dr. Posey changed his time estimate based on histology during cross examination is based on defendant's assertion that Dr. Posey never testified that the victim was injured within four to eight hours (rather than zero to eight hours) before being found unresponsive. On direct examination, Dr. Posey testified that his opinion was the victim's injuries "could have occurred anywhere in about a four to maximum eight-hour window prior to her being found unresponsive." Defendant argues the time period this describes is from 5 a.m. to 1 p.m. But Dr. Posey went on to explain, "if we use the time of day of being unresponsive at 12:55 or 1:00 p.m., you back up four hours, it's at 9:00 o'clock. If let's say—we want to say it's in a four to eight-hour window, then it backs it up anywhere from 5:00 in the morning *until* about 8:00 o'clock in the morning—8:00 to 9:00 o'clock in the morning. So that's your window of time that you can say based on the histology." (Italics added.) On cross examination, in response to questioning about his opinion in his report that the injuries were no more than four-to eight-hours old, Dr. Posey eventually agreed that his "final bottom line" was that the injuries could have been zero-to eight-hours old. The prosecutor's statements regarding this testimony were well within her wide latitude to discuss and draw inferences from the evidence.

4. Hypothetical

Defendant told hospital staff he had last seen the victim 30 minutes earlier, when she was in bed and acting normal with his five month old.

On cross-examination, the prosecutor asked Dr. Posey hypotheticals based on this information:

"[Prosecutor:] So, if I gave you a hypothetical and I told you that suppose a child who had the injuries like [the victim] had, that you saw, and that child was normal 30 minutes prior to admission, or prior to being unresponsive, do you have any idea in your medical—or in your expert opinion when that child could have suffered those injuries?

"[Dr. Posey:] Well, I don't think you need an expert to put this together. If this is a true statement and it's documented, then you know your time window then is, you know, about 30 minutes, zero to 30.

"[¶] . . . [¶]

"[Prosecutor:] You would agree that if a person said they saw a child normal 30 minutes prior to the child being unresponsive and then that child had injuries such as the injuries that [the victim] suffered, you would agree that those injuries would have occurred within that 30-minute time period?

"[Dr. Posey:] That's how you would deduce it, yes."

On redirect, Dr. Posey agreed he did not know what "normal" meant in the context of defendant's statements at the hospital, and that he was using a common dictionary definition of "normal" to answer the hypothetical questions. Nonetheless, the prosecutor's characterization of Dr. Posey's testimony as agreeing that if a child was acting normal 30 minutes ago she was injured within those 30 minutes was fair, and the inference the prosecutor deduced from this testimony that defendant must have inflicted the injuries was not misattributed to Dr. Posey. Defendant's assertion that these statements constituted misconduct is without merit.

5. Rigor Mortis

The People concede the prosecutor misstated the evidence when she claimed her exchange with Dr. Posey regarding rigor mortis resulted in any change to his opinion. Dr. Posey testified rigor mortis is when the body stiffens after death. Rigor mortis begins to show up three to four hours after death, but has already set in and faded at the time of an autopsy. Dr. Posey agreed there was no documentation of rigor mortis regarding the victim. Then the following exchange occurred:

"[Prosecutor:] [Y]ou testified earlier that this time—this window of four to eight hours, if you would consider rigor mortis, that actually can narrow up your time frame a lot, right?

"[Dr. Posey:] If you know it's present, yes.

"[Prosecutor:] Okay. If you know it's present, right?

"[Dr. Posey:] You're now beginning to mix apples and oranges, because inflammation is going to occur—if you're going to have inflammation, it will occur when injury occurs. That's when that time clock starts. [¶] Rigor mortis will start when death occurs. So we're talking about two different clocks.

"[Prosecutor:] Okay.

"[Dr. Posey:] And there's no way you can compare the two clocks.

"[Prosecutor:] I understand. I'm not talking about dating wounds anymore.

"[Dr. Posey:] Okay.

"[Prosecutor:] I'm not talking about dating wounds right now, I'm talking about rigor mortis, okay?"

While the prosecutor's statements during closing argument regarding the rigor mortis testimony were erroneous, on this record, we conclude they were harmless. The prosecutor's assertion that Dr. Posey changed his opinion again was not supported by her own statements regarding the testimony on rigor mortis: "He had to agree, because I asked him about rigor mortis, which he said does not set in for—until about three hours after a person has been dead—about three hours after. Not zero to three. It begins at three hours." Dr. Posey did agree rigor mortis does not set in until about three hours after a person has died, but this did not appear to impact any of his opinions. Likewise, the facts he agreed to would not have been helpful to the jury because the evidence, including that summarized by the prosecutor in making this argument, was clear that the victim was alive three hours before she arrived at the hospital. Additionally, following defendant's counsel's objection, the court instructed the jury that the testimony of the forensic pathologists was the source of contentious issues between the parties. "Now, what the Doctor's testimony was, you sort it out." Moreover, the jurors were instructed with CALCRIM No. 222 that "[n]othing that the attorneys say is evidence. In their opening

statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." (See *Daveggio, supra,* 4 Cal.5th at p. 864 [court's instruction to jury that " 'everything said in opening statements is not evidence and that is why you did not have notebooks and so forth' " cured any prejudice caused by prosecutor's statement].) Accordingly, the prosecutor's misstatement of the evidence was harmless.

We reject defendant's contention that reversal is required based on the cumulative effect of the errors we have found. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill, supra,* 17 Cal.4th at p. 844.) This is not such a case. To the extent we concluded or assumed the trial court erred and the prosecutor misstated the evidence, "no single error warrant[s] reversal, and we are not persuaded that reversal is warranted when those same nonprejudicial errors are considered collectively." (*People v. Nelson* (2011) 51 Cal.4th 198, 224-225.)

D. Instructions on Conflicts in Evidence

Defendant contends instructing the jury with CALCRIM Nos. 302 and 332 was error because they "directed jurors to resolve disagreements between experts and conflicts between lay witnesses using what amounted to a preponderance of the evidence standard." We disagree.

1. Jury Instructions

The trial court instructed the jury with CALCRIM No. 302: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

The jury was also instructed with CALCRIM No. 332, in pertinent part, as follows:

"Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions but are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied is true and accurate. You may disregard any opinion you find to be unbelievable, unreasonable, or unsupported by the evidence.

"[¶] . . . [¶]

"If the expert witnesses disagreed with one another—and you heard both gentlemen here—you should weigh each opinion against the other. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare . . . the expert's [*sic*] qualifications."

2. No Instructional Error

Defendant argues these instructions directed the jury to apply the preponderance of the evidence standard because they directed it to weigh the prosecution's evidence against the defendant's evidence and decide the case based on which side's evidence outweighed the other. "In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." ' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 831.) Neither challenged instruction refers to the issues for the jury to decide or the ultimate burden of proof. For that, the jury had other instructions that explained the prosecution's burden of proving guilt beyond a reasonable doubt, such

as CALCRIM No. 220. " ' "Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." ' " (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Neither CALCRIM No. 302 nor 332 tells "the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191 [discussing CALCRIM No. 302].) The jury was instructed under CALCRIM No. 332 to "weigh" the conflicting opinions of expert witnesses but not, as defendant suggests, "to resolve the disagreement by a preponderance of the evidence." The jury was told it was "not required to accept [the opinions] as true or correct. The meaning and importance of any opinion are for you to decide." Likewise, CALCRIM No. 302 leaves it to the jury to "decide what evidence, *if any*, to believe." (Italics added.) It does not say anything "about choosing between prosecution and defense witnesses." (*People v. Anderson* (2007) 152 Cal.App.4th 919, 940.) The instructions do not, in short, tell the jury to weigh the sides against each other and decide the case based on which is more convincing. The jury was correctly instructed.

E. Counts 2, 3, and 4 (§ 273d)

As set forth above, defendant was convicted of one count of assault on a child causing death (count 1—§ 273ab, subd. (a)) and three counts of inflicting cruel or inhuman corporal punishment or injury on a child (§ 273d, subd. (a)) based on bruises (count 2), fractured ribs (count 3), and head injuries (count 4). Defendant contends counts 2 through 4 must be reversed because they are lesser than, and necessarily included within, count 1. Relatedly, he contends it was error to instruct the jury that he could be convicted on all counts. We agree that section 273d, subdivision (a) is a lesser included offense of section 273ab, subdivision (a). Thus, we need not reach the question of instructional error.

1. Lesser Included Offenses

"The law prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it, when based on the same conduct." (*People v. Milward* (2011) 52 Cal.4th 580, 589.) " 'In deciding whether multiple conviction is proper, a court should consider only the statutory elements.' [Citation.] 'Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former.' [Citation.] In other words, ' "[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." ' " (*People v. Sanders* (2012) 55 Cal.4th 731, 737.)

Section 273ab, subdivision (a) defines the offense of "assault on a child causing death, an offense sometimes referred to as child abuse homicide." (*People v. Wyatt* (2010) 48 Cal.4th 776, 779 (*Wyatt*).) It applies to "[a]ny person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ." (§ 273ab, subd. (a).) Section 273d, subdivision (a) provides: "Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony . . . ."

The People argue section 273d, subdivision (a) is not a lesser included offense of section 273ab, subdivision (a) because a person can assault a child causing death without inflicting cruel or inhuman corporal punishment during the process. But defendant's argument is based on the fact that section 273d can also be violated by willfully inflicting an injury resulting in a traumatic condition. (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981.) Again, " ' "[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." ' " (*People v. Sanders, supra,* 55 Cal.4th at p. 737.) That there is an alternative way of violating section 273d is irrelevant. "[T]his merely shows the greater offense is

not included in the lesser offense." (*People v. King* (2000) 81 Cal.App.4th 472, 478.) It does not show that the lesser offense is not included in the greater offense. Defendant asserts "it is impossible to willfully assault a child with force that causes death without also willfully inflicting injury that causes a traumatic condition." The People's briefing did not address this assertion, and this is the question we now turn to.

We first address the requirement that an injury be "willfully inflict[ed]" and the intent required to establish such a violation of section 273d. "Section 273d has been interpreted as a general intent statute." (*People v. Sargent* (1999) 19 Cal.4th 1206, 1219.) "The word 'wilfully,' while ofttimes causing confusion in certain areas of the law, is clear in the statute in question. The word has the meaning defined in Penal Code section 7, subdivision 1, which specified that 'The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or injure another, or to acquire any advantage.' " (*People v. Atkins* (1975) 53 Cal.App.3d 348, 358.) In *People v. Thurston* (1999) 71 Cal.App.4th 1050, an appellate court interpreted section 273.5, subdivision (a), a statute whose wording is similar to that of section 273d. At that time, section 273.5, subdivision (a) provided that it was a felony to "willfully inflict[ ] upon" one's spouse "corporal injury resulting in a traumatic condition." (Stats. 1996, ch. 1077 § 16, pp. 7306-7307.) The defendant argued that, "even if characterized as a general intent crime, section 273.5, subdivision (a) still requires an instruction that the perpetrator had a separate intent to bring about the injury." (*People v. Thurston, supra,* at p. 1055.) The appellate court disagreed and explained that "[t]o satisfy the intent element of spousal injury, a prosecutor need only show an intended assaultive act." (*Id*. at pp. 1055-1056.) The same must be true for a violation of section 273d based on willful infliction of an injury resulting in a traumatic condition.

When a defendant violates section 273ab, he necessarily commits an intended assaultive act for purposes of section 273d. The elements of the former offense are:

" '(1) A person, having the care or custody of a child under the age of eight; (2) assaults this child; (3) by means of force that to a reasonable person would be likely to produce great bodily injury; (4) resulting in the child's death.' "[5] (*Wyatt, supra,* 48 Cal.4th at p. 780.) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) " '[T]he defendant must intentionally engage in conduct that will likely produce injurious consequences,' " but because assault is a general intent crime, again, " 'the prosecution need not prove a specific intent to inflict a particular harm.' " (*Wyatt, supra,* at p. 780.) The force required to violate section 273ab is greater than the force required to commit an assault. (See *People v. Basuta* (2001) 94 Cal.App.4th 370, 392 [force requirement in section 273ab is, if anything, more restrictive than a requirement that an assault be " 'by any means of force likely to produce great bodily injury' "].) "[T]he assault element of a section 273ab offense requires an intentional act and actual knowledge of those facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from the act." (*Wyatt*, *supra,* at p. 786.) This is more than sufficient to demonstrate an intentional assaultive act for purposes of section 273d as well.

Defendant also correctly observes that willful infliction of an injury resulting in a traumatic condition under section 273d and a violation of section 273ab, subdivision (a) both effectively require a battery. "A battery is any willful and unlawful use of force or violence upon the person of another." (§ 242.) "Thus, assault 'lies on a definitional . . . *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault.' " (*People v. Williams* (2001) 26 Cal.4th 779, 786.) A defendant who willfully inflicts "an injury resulting in a traumatic condition" (§ 273d, subd. (a)) also commits a battery: "It would have been

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[5] The requirement in section 273d, subdivision (a) that the victim be a child is necessarily satisfied by the requirement in section 273ab, subdivision (a) that the victim be under eight years of age.

impossible for [defendant] to make an unlawful assault and inflict a corporal injury resulting in a traumatic condition upon [the victim] without the unlawful use of force or violence upon his person." (*People v. Stewart* (1961) 188 Cal.App.2d 88, 90; see also *People v. Sargent, supra,* 19 Cal.4th at p. 1220 ["battery . . . is a lesser included offense of section 273d"].) For similar reasons, a violation of section 273ab also requires a battery. It requires an assault "by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death." (§ 273ab, subd. (a).) As this court has previously explained, this phrase means that the "the force must be likely, in the mind of a reasonable person, to produce great bodily injury *and* the force must result in the child's death." (*People v. Preller* (1997) 54 Cal.App.4th 93, 98.) Section 273ab, subdivision (a) "elevates the punishment for assault" when certain facts exist, including that "the assault results in death." (*People v. Norman* (2003) 109 Cal.App.4th 221, 228-229.) It too thus effectively requires a battery.

Finally, a violation of section 273d based on the willful infliction of an injury requires "an injury resulting in a traumatic condition." (§ 273d, subd. (a).) "For the purposes of the statute, traumatic condition has been defined as a wound or other abnormal bodily condition resulting from the application of some external force."[6] (*People v. Stewart, supra*, 188 Cal.App.2d at p. 91.) Where a child has died as a result of the force employed as specified in a violation of section 273ab, subdivision (a) ("that to a reasonable person would be likely to produce great bodily injury"), we conclude that "an injury resulting in a traumatic condition" must necessarily have occurred within the meaning of section 273d. (Cf. *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1468

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6 In comparison, section 273.5, subdivision (d) provides that, as used in that section, " 'traumatic condition' means a condition of the body, such as a wound, or external or internal injury, including, but not limited to, injury as a result of strangulation or suffocation, whether of a minor or serious nature, caused by a physical force."

["The People do not suggest how a victim could be killed by a moving vehicle and not incur injury in the process. We cannot envision such a scenario"].) Therefore, a defendant who violates section 273ab, subdivision (a) necessarily also violates section 273d.

2. Reversal of Lesser Included Offenses

"When a defendant is found guilty of both a greater and a necessarily lesser included offense arising out of the same act or course of conduct, and the evidence supports the verdict on the greater offense, that conviction is controlling, and the conviction of the lesser offense must be reversed." (*People v. Sanders, supra,* 55 Cal.4th at p. 736.) Defendant contends his convictions for the lesser included offenses in counts 2 through 4 must be reversed because they involved the same course of conduct as count 1. This is another issue the People failed to address.

Dr. Omalu testified the victim died as a result of "blunt force trauma of the head *and* the trunk." (Italics added.) Dr. Posey likewise concluded the victim died from blunt force injury of the head and trunk, complicated by exsanguination, meaning that she bled to death. Dr. Omalu testified that all of the injuries "occurred in one event, in the same event." He opined the victim was hit in the face with a part of the body, slammed on a surface, stomped, and smothered, and died within 15 minutes of sustaining her injuries.

With respect to count 1, during closing argument, the prosecution listed various actions that could have resulted in force and pressure on the victim's body and then argued, "The People do not have to prove that the Defendant actually stomped her or hit her or punched her. We don't know exactly what he did to her because we weren't there. These are things that he could have done and probably did do. It doesn't matter if it was shaking or hitting or throwing or slapping. Whatever he did, he applied that pressure through means that killed her, that was an application of force on her body." Likewise, the prosecutor did not argue that any one act or injury caused the victim's death but rather that "whatever mechanism he did to inflict those injuries was the reason she died."

With respect to counts 2 through 4, the prosecutor explained, "Count Two is specific to the bruises found on [the victim]'s body, her face, her mouth, her back, the bruises on her cheek, on her chest. Count Three is regarding her broken ribs. . . . Count Four is her head injuries." Again, the actual method of infliction was not argued but the resultant injuries: "We know the Defendant intentionally . . . injured [the victim] by whatever mechanism he did, whether it was throwing, punching, stomping, kneeing, or anything other means, it caused blunt force trauma." Under these circumstances, counts 2, 3, and 4 were based upon the same course of conduct as count 1. (See *People v. Milward, supra,* 52 Cal.4th at p. 584 ["Both convictions were based on the same conduct, namely, defendant's attack on [the victim]"].) The trial court also apparently agreed because it stayed the sentences on counts 2, 3, and 4 under section 654. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507 [sentence must be stayed under section 654 when the offenses occurred during the same course of conduct pursuant to one objective].) We now reverse these counts instead.

Defendant argues the fines and assessments associated with counts 2 through 4 should be stricken. We agree. The restitution fine imposed under section 294, subdivision (a) is no longer authorized. The court operations assessment imposed under section 1465.8 must be reduced to $40, and the court facilities assessment imposed under Government Code section 70373 must be reduced to $30 because only defendant's conviction for count 1 remains.

F. Worktime Credits

Defendant contends, and the People concede, that, in orally pronouncing sentence, the trial court erroneously stated defendant would be unable to earn postsentence worktime credits against his life sentence. We accept the concession. A person who is convicted of murder cannot accrue worktime credits (§ 2933.2), but defendant was not convicted of murder. (*People v. Duff* (2010) 50 Cal.4th 787, 797 [conviction under § 273ab was a nonqualifying offense for purposes of § 2933.2]; *People v. Norman, supra,*

109 Cal.App.4th at p. 227 ["section 273ab is not a murder statute"].) Defendant may accrue up to 15 percent worktime credit. (§§ 667.5, subd. (c)(7), 2933.1, subd. (a).) Thus, he is entitled to remand for an oral pronouncement of an authorized sentence not requiring him to serve 100 percent of his minimum term.

II. DISPOSITION

The count 2, 3, and 4 convictions for inflicting corporal punishment or injury on a child under section 273d are reversed. The court operations assessment imposed under section 1465.8 is reduced to $40, and the court facilities assessment imposed under Government Code section 70373 is reduced to $30. The restitution fine imposed under section 294, subdivision (a) is also stricken. The sentence is vacated and the matter is remanded to the trial court for resentencing with directions to orally pronounce sentence without requiring defendant to serve 100 percent of his minimum term. Upon resentencing, the trial court is directed to prepare a new abstract of judgment reflecting these changes and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

BLEASE, J.